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Supreme Court of the United States

OCTOBER TERM, 1940

No. 778

NEW JERSEY WORSTED MILLS,

Petitioner,

against

OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES and FEDERAL TRUST COMPANY, Executors of the Will of Edward E. Gnichtel.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF

LAURENCE ARNOLD TANZER,
Counsel for Petitioner.

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NEW JERSEY WORSTED MILLS,
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OLIVE RIPLEY GNICHTEL, HENRY A. SCHWEDES and FEDERAL TRUST COMPANY, Executors of the Will of Edward E. Gnichtel.

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS.

This is a petition for a writ of certiorari to the Third Circuit Court of Appeals to review its decision affirming the judgment of the District Court for the District of New Jersey, in favor of defendants.

Statement.

Petitioner, after filing its income and profits tax returns for its fiscal years ending March 31, 1918, and March 31, 1919 (hereinafter referred to as 1918 and 1919 respectively), and paying the tax disclosed thereby (R. 52-54), computed at the rates prescribed by the Revenue Acts of 1917 and 1918 (R. 4, 5, 29, 30), applied to the Commissioner of Internal Revenue for "special assessment" of its profits taxes for those years under section 210 of the Revenue Act of 1917 and sections 327 and 328 of the Revenue Act of 1918 (R. 54).

The Commissioner allowed the application April 7, 1923, after careful consideration and review (R. 12, 14, 18, 60, 54, 55), and found and determined and declared of record that the tax if determined without the benefit of section 327 of the Revenue Act of 1918 would, owing to abnormal conditions affecting the capital or income of petitioner, work upon petitioner an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of said section and the tax computed by reference to the representative corporations specified in section 328 (R. 5, 6, 31). He found that, based upon the experience of a group of representative concerns engaged in a like or similar trade or business to that of petitioner, petitioner had been overassessed $401,577.98 for 1918 and $108,328.53 for 1919 (R. 54, 60, 13). He issued and delivered to petitioner certificates of overassessment in those amounts (R. 55, 60, 14, 18), and the amounts thereof were refunded to petitioner with interest (R. 55).

On March 25, 1924, the Commissioner by letter notified petitioner that "a reexamination" had been made of petitioner's application for special assessment "together with all other evidence in the case", and that the determination theretofore made was "erroneous"; and that the tax liabilities had been recomputed, for 1918 under the relief provisions and for 1919 under the ordinary provisions, disclosing additional tax of $119,668.67 for 1918 and $108,328.53 for 1919, which would be listed for assessment immediately (R. 55, 60, 22-27). In pursuance of this redetermination the Commissioner assessed against petitioner additional taxes in said amounts (R. 55) and notices and demands for payment thereof were served upon petitioner by the collector (R. 56).

The Commissioner did not disclose to petitioner the facts, evidence, or basis upon which such redetermination was based nor give petitioner an opportunity to be heard before making the reassessments (R. 8, 32). The record

shows, however, that the redetermination was made upon a reconsideration of the original application, and not upon any claim of fraud or mistake (R. 31, 32, 22, 23, 63, 94, 95, 110-112).

Petitioner filed claims for abatement of the additional assessments (R. 56, 65-70), which were rejected by the Commissioner (R. 56). Thereafter petitioner filed a petition with the United States Board of Tax Appeals to review the action of the Commissioner (R. 56, 73-79), but the petition was dismissed by the Board on the Commissioner's plea of want of jurisdiction on the ground that the assessment complained of had been made prior to June 2, 1924, the effective date of the Revenue Act of 1924, which created the Board (R. 56, 57, 80, 81).

The collector issued warrants of distraint for the additional assessments (R. 57), and collected the amounts thereof, in part by applying as a credit sums due petitioner for overpayment of other taxes, and the balance by petitioner's check delivered under protest April 29, 1926 (R. 57, 58, 82, 83, 84).

Upon consideration of claims for refund filed by petitioner February 20, 1928, the Commissioner made a third computation of the 1918 tax under the relief provisions and found that in the prior redetermination petitioner had been overassessed $38,644.85 (R. 58, 93-97, 103), which was refunded to petitioner (R. 58). He adhered to the redetermination in so far as it revoked the allowance of special assessment for 1919 (R. 95). Accordingly, on July 15, 1929, he disallowed the claim for refund for 1918 for $81,023.82, the balance of tax paid over the amount refunded (R. 58), and on December 26, 1930, he rejected the claim for refund for 1919 (R. 58, 59).

This action, to recover the taxes paid as aforesaid, was commenced July 13, 1931 (R. 59), against the collector who made the collection, and who was then no longer in office. He died during the pendency of the action, and his executors were substituted as defendants (R. 118, 119, 38).

The case came on for hearing on motions by both parties for summary judgment, based on the pleadings and stipulations of fact (R. 40-44). The District Court rendered judgment for defendants (R. 44, 2), and the Circuit Court of Appeals affirmed (R. 140).

Jurisdiction.

The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, § 347).

The judgment of the Circuit Court of Appeals was entered December 9, 1940.

Questions Presented.

1. Has the Commissioner of Internal Revenue power to retake by summary process moneys lawfully refunded to a taxpayer in the exercise of discretionary power conferred upon the Commissioner by Congress?

2. Does such retaking by summary process not subject to judicial review and without disclosure of the grounds or basis therefor constitute a taking of the taxpayer's property without due process of law?

Reasons Relied on for Allowance of Writ.

1. The question decided below, of the power of the Commissioner of Internal Revenue to retake by summary process moneys theretofore lawfully refunded by him to a taxpayer, is an important question of federal law which has not been, but should be, settled by this Court.

2. The decision below is in direct conflict with the decision of the Sixth Circuit Court of Appeals in *Woodworth* v. *Kales*, 26 F. (2d) 178, holding that the Commis-

sioner is without authority to reconsider and revoke his determinations of fact or discretion in the absence of fraud or mistake, and is likewise in conflict with the decision of the same court in *Austin Co.* v. *Commissioner*, 35 F. (2d) 910, recognizing that rule of law as applicable to special assessment cases and supplementing it only to the extent of holding that the burden of proof is on the taxpayer to show the absence of fraud or mistake—the existence of which is negatived by the admitted facts in the present case.

3. The decision below appears to be in conflict with a long line of decisions in this Court, establishing the principle that the determination of an administrative officer in a matter which is by law subject to his final determination cannot be reopened by himself or by anyone else (*Kaufman* v. *U. S.*, 11 Ct. Cl. 659, 670, affirmed 96 U. S. 567; *U. S.* v. *Schurz*, 102 U. S. 378; *Noble* v. *Union River Logging R.R. Co.*, 147 U. S. 165, 176, 177; *Ballinger* v. *Frost*, 216 U. S. 240, 250; *Lane* v. *Watts*, 234 U. S. 525, 540; *Kern River Co.* v. *U. S.*, 257 U. S. 147, 151, 152; *Great Northern Railway Co.* v. *Steinke*, 261 U. S. 119, 130; *West* v. *Standard Oil Co.*, 278 U. S. 200, 218, 219; *Butte, Anaconda & Pacific Railway Co.* v. *U. S.*, 290 U. S. 127, 142, 143).

4. The decision below appears to be in conflict with the decisions of this Court in *Bonwit Teller & Co.* v. *U. S.*, 283 U. S. 258, 264, 265, and *Daube* v. *U. S.*, 289 U. S. 367, holding that delivery to and acceptance by a taxpayer of a certificate of overassessment creates an account stated and vests in the taxpayer new rights not subject to recall by the Commissioner.

5. The decision below appears to be in conflict with the decisions of this Court holding that one acquiring rights as a result of administrative action cannot be deprived of them without due process of law (*Garfield* v. *U. S. ex*

rel. Goldsby, 211 U. S. 249, 262; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 176, 177), and that an exercise of administrative discretion not based on evidence and findings open to contest and subject to judicial review does not constitute due process of law (*Interstate Commerce Commission* v. *Louisville & Nashville Railroad Co.,* 227 U. S. 88, 91-94; *Crowell* v. *Benson,* 285 U. S. 22, 48; *Southern Railway Co.* v. *Virginia ex rel. Shirley,* 290 U. S. 190, 197, 198; *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 68, 69; *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 302-304; *Morgan* v. *U. S.,* 304 U. S. 1, 14, 15, 18, 19).

WHEREFORE it is respectfully submitted that the prayer of this petition should be granted.

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